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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-158

BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE and EDWARD J. BOLING,

Petitioners,

v.

DR. RAJ P. SONI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
JURISDICTIONAL STATEMENT	1
OPINIONS BELOW	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	19
APPENDIX A - Decision of the District Court	20
APPENDIX B - Decision of the Court of Appeals	27
APPENDIX C - Denial of Petition for Rehearing	43
APPENDIX D - Excerpt from Trial Proceedings	44
APPENDIX E - Trial Exhibit No. 6	46
APPENDIX F - Opinion of Office of Attorney General	47

CITATIONS

Cases:

Applewhite v. Memphis State University, 495 S.W.2d 190 (1973)	18
Baker v. Nashville Housing Authority, 219 Tenn. 201, 408 S.W.2d 651 (1966)	18
Cusumano v. Ratchford, 507 F.2d 980 (8th Cir. 1974)	11, 12, 16
Johnson v. Railway Express Agency, Inc., 43 L.W. 4623 (May 19, 1975)	9
Knoxville Housing Authority, Inc. v. City of Knoxville, 174 Tenn. 76, 123 S.W.2d 1085 (1939)	18
Perry v. Sindermann, 408 U.S. 593	10, 12, 14, 16
State v. City of Knoxville, 180 Tenn. 462, 176 S.W.2d 801 (1944)	8

University of Tennessee v. People's Bank,
157 Tenn. 87, 6 S.W.2d 328 (1928) 18

Watts v. Board of Curators, University of Missouri,
363 F. Supp. 883 (W.D. Missouri, 1973) 12

Statutes:

Tennessee Code Annotated, Section 20-1702 17
Tennessee Code Annotated, Section 28-304 9
Tennessee Code Annotated, Section 49-1303 7
Acts of Tennessee (1807), Chapter 64, Section 1 . 17

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of The United States Court of Appeals for the Sixth Circuit in this case.

JURISDICTIONAL STATEMENT

The judgment of The Court of Appeals was entered on March 12, 1975. A timely petition for rehearing was filed and was denied on June 5, 1975 (Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (Appendix A, *infra*). is reported at 376 F. Supp. 289. The opinion of The Court of Appeals (Appendix B, *infra*) is reported at 513 F.2d 347.

QUESTIONS PRESENTED

1. Did the provisions of Tennessee Code Annotated 49-1303 prevent the Respondent, while a non-citizen of the United States, from obtaining a property interest in future and continued or permanent employment from The University of Tennessee?

2. Did the existence of a formal tenure system of The University of Tennessee preclude Respondent from obtaining de facto tenure from The University of Tennessee in a manner contrary to or inconsistent with the provisions and requirements of the formal tenure system?

3. If Respondent was not precluded from obtaining de facto tenure from The University of Tennessee in a manner contrary to and inconsistent with the provisions and requirements of the University's formal tenure system, did Respondent in fact obtain such de facto tenure?

4. Does the provision of the Charter of The University of Tennessee that the University may "sue and be sued" constitute a waiver of the University's Eleventh Amendment immunity, as a state agency, such that the property of the University is subject to divestiture through exercise of judicial power?

STATUTORY PROVISIONS INVOLVED

1. The Court of Appeals declined to apply or explain its refusal to apply to the cause of action before this Court Section 49-1303 of Tennessee Code Annotated, which provides in pertinent part:

> "It shall be unlawful for the trustees of the University of Tennessee, the state board of education, or any county or city board of education, or any other person to employ any superintendent, principal, teacher, tutor, supervisor, or other person to have in any way the custody and care of students of the public educational institutions of this state who is not a citizen of the United States of America; provided that nothing in this section shall be construed to prohibit arrangements whereby professors and teachers who are citizens of other nations may be employed on a temporary basis on the faculties of colleges, universities or public schools in Tennessee."

2. Involved in the question of whether or not The University of Tennessee has waived its immunity from suit and/or immunity of its property from divestiture through exercise of judicial power is Section 20-1702 of Tennessee Code Annotated which provides:

> "No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state."

3. Involved in the same question is Chapter 64, Section 1 of the Acts of Tennessee of 1807 which provides, in reference to the Trustees of The University of Tennessee:

> "The said trustees and their successors by the name aforesaid, may sue and be sued, plead and be impleaded, in any court of law or equity in this State or elsewhere."

STATEMENT

In September 1967 Respondent, Dr. Raj P. Soni, joined the Mathematics Department of The University of Tennessee as a Visiting Associate Professor.

On several occasions during the 1967-1968 school year Respondent made known to the head of the Mathematics Department, first Professor John H. Barrett and then his successor Dr. Donald J. Dessart, his concern over the permanency of his employment with the University and his desire that a decision be made one way or the other.

As a result of Respondent's concern an effort was made to have the question of his tenure considered at a faculty meeting scheduled for October 29, 1968. Prior to that meeting Dr. Dessart consulted with the General Counsel of the University concerning the possibility of tenure for Respondent. As a result of his consultation with the General Counsel, Dr. Dessart advised the faculty that Respondent was not a citizen of the United States and therefore could not be considered for a grant of tenure because Tennessee law and a University regulation adopted pursuant to the law prohibited a grant of permanent employment to non-citizens of the United States.

The faculty did, however, vote to recommend Respondent for an appointment as "Associate Professor without tenure." A letter dated October 29, 1968, was sent by

BLEED THROUGH

Dr. Dessart to Respondent which provided in pertinent part:

"Dear Raj:

"It is a pleasure to inform you that at a meeting of the tenured associate and full professors of the Department of Mathematics, it was recommended that you be appointed an associate professor without tenure effective July 1, 1969. The question of recommending tenure will be considered by - similar departmental group at the time you become a citizen of the United States. In addition, it was recommended that you receive the full benefits of participation in TIAA/CREF at the first feasible opportunity, which will probably be September 1, 1969."

Respondent participated in the University retirement system, attended departmental meetings and was permitted by the head of the Department of Mathematics to vote on recommendations of tenure for other faculty members although the acquisition of tenure was not a prerequisite to such activities.

Respondent was rehired for the 1969-70, 1970-71, and 1971-72 school years.

On December 15, 1971, Respondent became a citizen of the United States. Soon thereafter, on February 10, 1972, a meeting of the tenured faculty was scheduled for the purpose of considering Respondent for a recommendation of tenure. At that meeting the faculty voted not to recommend Respondent for a grant of tenure.

On March 8, 1972, the then head of the Department of Mathematics Dr. Harry T. Mathews notified Respondent by letter that his appointment would be terminated as of August 31, 1973.

Respondent was not provided a due process hearing of the type accorded tenured members of the faculty but did appeal his termination through the appropriate administrative channels of the University up to and including the Board of Trustees.

Respondent filed a Complaint with the District Court on August 24, 1973, asserting that he had been granted tenure by The University of Tennessee, that he had obtained an expectancy of continued employment which amounted to a property right and, therefore, that he was denied due process when terminated without a due process hearing.

The District Court entered judgment in favor of Respondent on February 21, 1974, holding Respondent to be entitled to back pay from August 31, 1973, until such time as The University of Tennessee provides a due process hearing of the type to which faculty members having a property interest in continued employment are entitled.

The District Court held that there existed sufficient objective evidence to vest in Respondent a reasonable expectation of future and continued employment notwithstanding Respondent's awareness of the State law and University rule which prohibited a grant of permanent employment to a non-citizen of the United States, Respondent's receipt of a letter in 1968 informing him that the position for which he had been recommended was "without tenure" and the existence of a formal tenure policy of the University.

Petitioners appealed to The Court of Appeals which, by opinion entered March 12, 1975, affirmed the judgment and findings of the District Court and additionally ruled that The University of Tennessee had by provision of its Charter that it may sue and be sued, waived immunity accorded by the Eleventh Amendment to State instrumentalities.

Petitioners petitioned The Court of Appeals for a rehearing which petition was denied by The Court of Appeals by order entered June 5, 1975.

REASONS FOR GRANTING THE WRIT

QUESTION 1

DID THE PROVISIONS OF TENNESSEE CODE ANNOTATED 49-1303 PREVENT THE RESPONDENT, WHILE A NON-CITIZEN OF THE UNITED STATES, FROM OBTAINING A PROPERTY INTEREST IN FUTURE AND CONTINUED OR PERMANENT EMPLOYMENT FROM THE UNIVERSITY OF TENNESSEE?

There is a conflict between the provisions of a Tennessee statute and the Tennessee Supreme Court and the Sixth Circuit Court of Appeals on this question which warrants resolution by this Court.

Section 49-1303 of Tennessee Code Annotated provides in pertinent part:

> "It shall be unlawful for the trustees of the University of Tennessee ... to employ any ... teacher ... to have in any way the custody and care of students of the public educational institutions of this state who is not a citizen of the United States of America; provided that nothing in this section shall be construed to prohibit arrangements whereby professors and teachers who are citizens of other nations may be employed on a temporary basis on the faculties of colleges, universities or public schools in Tennessee;"

The Tennessee Supreme Court has held that by virtue of this statutory provision a non-citizen of this country "had no rights as a teacher whatever," and therefore was

not entitled to have specific charges filed against her and a hearing. *State v. City of Knoxville*, 176 S.W.2d 801, 803 (1944). The Court held that the law could not be changed by the State Board of Education through the issuance of a teaching certificate and that such certificate was *void ab initio*. *Id.* pp. 802, 803.

In direct conflict with the restrictions imposed by the Tennessee statute and the ruling of the Tennessee Supreme Court, the Court of Appeals held that Respondent, while a non-citizen of the United States, had obtained a cognizable property interest in the form of a reasonable expectation of future and continued employment (App. B, *infra*, pp. 30-35), a relative degree of permanency as an employee (*Ibid.*), an understanding that his employment would continue on a permanent basis (*Id.*, p. 33), and a right to a due process hearing prior to termination (*Ibid.*).

Contrary to the holding of the State Supreme Court the Sixth Circuit, by holding that certain actions on the part of faculty members and others created in Respondent a property interest of the very type prohibited by state law, held that acts in violation of that law may be legally effective and not *void ab initio*.

It is significant that neither the District Court nor the Court of Appeals explained *why* the provisions of T.C.A. 49-1303 did not prevent Respondent from obtaining the claimed property interest.

It is also significant that the constitutionality of the statute was not an issue and was not a basis for either court's decision (App. A, *infra*, p. 22 fn. 2); (App. B, *infra*, p. 21 fn. 1).[1]

[1]A review of the constitutionality of T.C.A. 49-1303 would have necessitated a ruling on two additional contentions raised by Petitioners in both Courts below but not spoken to by either Court: (1) Respondent was barred

(Continued on following page)

BLEED THROUGH

A resolution of this question is of critical importance to Petitioners, as it undoubtedly is to every other educational institution in Tennessee. The critical aspect of the question concerns not whether citizens should or should not be treated equally with citizens for employment purposes but whether or not hundreds or even thousands of non-citizens or naturalized citizens who have at some time in the past been denied *consideration* for permanent employment (i.e. tenure) may now claim the *possession* of such property interest arising mysteriously from the inaction (rather than negative or conditional action) of Petitioners. Such an occurrence has serious economic and operational implications for Petitioners (e.g. a potential ballooning of the total number of Petitioners' tenured faculty resulting in a distortion of the recommended tenured-non-tenured faculty ratio which would necessitate future grants of tenure for a period of time thereby damaging the Petitioners' ability to attract new faculty members).

(Continued from preceding page)

from this action by his failure to commence action within one year of the date (October 29, 1968) on which he was refused consideration for tenure on the basis of his non-citizenship as required by Tennessee Code Annotated 28-304 which provides that "... civil actions for compensatory ... damages... brought under the federal civil rights statutes... shall be commenced within one (1) year after cause of action accrued." See also **Johnson v. Railway Express Agency, Inc.**, 43 L.W. 4623 (May 19, 1975); (2) Respondent's cause of action is moot: A successful challenge of a statute denying permanent employment to non-citizens would properly result in a judicial order that Respondent be considered for such employment (i.e. tenure) in the same manner in which citizens are considered. Respondent had, however, been granted precisely such consideration upon becoming a citizen (On February 10, 1972, the mathematics faculty voted not to recommend Respondent for tenure). Therefore, such a judicial order would in effect require to be done that which had already been done.

Furthermore, as a result of the Sixth Circuit's decision, Petitioners find themselves in the unenviable position of having complied for many years in good faith with the law of Tennessee only to find that they face dire consequences for having done so. Such considerations warrant the review of the Court of Appeals' decision by this Court.

QUESTION 2

DID THE EXISTENCE OF A FORMAL TENURE SYSTEM OF THE UNIVERSITY OF TENNESSEE PRECLUDE RESPONDENT FROM OBTAINING DE FACTO TENURE FROM THE UNIVERSITY OF TENNESSEE IN A MANNER CONTRARY TO OR INCONSISTENT WITH THE PROVISIONS AND REQUIREMENTS OF THAT FORMAL TENURE SYSTEM?

There is a conflict between the Court of Appeals for the Sixth Circuit and the Court of Appeals for the Eighth Circuit concerning the significance of the holding of this Court that:

> "There may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university ... that has no explicit tenure system ... but that nonetheless may have created such a system in practice." *Perry v. Sindermann*, 408 U.S. 593, 602 (1972).

The Sixth Circuit recognized the existence of a formal tenure policy of The University of Tennessee (App. B, *supra*, p. 31). However, the Sixth Circuit held that the existence of a well established tenure system did not prevent an individual, such as Respondent, who had not been granted formal tenure, from acquiring a reasonable expectation of continued employment. This holding was based

BLEED THROUGH

on the Sixth Circuit's conclusion that this Court "did not say, as it easily could have, that a reasonable expectancy cannot arise in the context of a formal tenure system" (*Id.*, p. 33). On the basis of this conclusion the Sixth Circuit held, as previously noted, that Respondent had a property interest and was therefore entitled to a due process hearing prior to termination.

The Court of Appeals for the Eighth Circuit has reached a directly conflicting position on the same question in *Cusumano v. Ratchford*, 507 F.2d 980 (1974).

The pertinent facts in *Cusumano* are identical to those in Soni. A formal tenure policy was in existence at The University of Missouri which, like the tenure policy of The University of Tennessee, expressly provided the method by which tenure was granted.

In both cases, the faculty member(s) was not granted tenure in accordance with the provisions of the formal tenure policy. Also, in both cases the faculty member(s) was notified of his (their) non-retention by the employing University but was not provided with a specific reason for non-retention (Respondent was generally informed that he was not of the quality expected of the tenured staff of The University of Tennessee).

The faculty member(s) in both cases claimed to have obtained de facto tenure notwithstanding the formal tenure policy.

The Eighth Circuit, however, reached a decision contrary to the Sixth Circuit holding that the plaintiffs before that Court had not obtained de facto tenure or property interest and did not have a right to a pre-termination hearing. *Cusumano*, *supra*, p. 987.

The Eighth Circuit, in reaching this position, referred to the holding of this Court in *Perry*:

> "The entire thrust of the tenure regulations is to avoid the de facto tenure hypothesized in *Sindermann*, *supra*, 408 U.S. at 602, 92 S. Ct. at 2700, amounting to 'an unwritten common law' in a particular university that certain employees shall have the equivalent of tenure." *Cusumano*, *supra*, p. 984.[2]

The tenure policy of The University of Tennessee (App. A, *supra*, p. 21, fn. 1); (App. B, *supra*, p. 38, fn. 1) is quite obviously intended for the same purpose.

A resolution of this question is of extreme importance to Petitioners. The position of the Sixth Circuit unless reversed renders the formal tenure policy of The University of Tennessee useless since, in the opinion of the Sixth Circuit, "The existence of such a system is but one factor ... to consider in analyzing the due process claim of a formally non-tenured professor" (*Id.*, p. 33). In light of the Sixth Circuit ruling there clearly can be no policy which, however skillfully drafted, precludes unexpected claims of tenure; always there is the danger to the University that a faculty member may defeat the best planned intentions of the University to deny him tenure simply by offering "other evidence" in support of his claim of a property interest.

The official records of the University promulgated pursuant to the tenure policy which provides that "the precise terms and conditions of every appointment should be stated

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[2] In another case involving a Missouri educational institution a district court held that "expectancy of future and continued employment is not a factor where a university has an existing tenure system." **Watts v. Board of Curators, University of Missouri**, 363 F. Supp. 882 (1973).

in writing and be in the possession of both institution and teacher before the appointment is consummated" (App. B, *supra*, p. 39) are likewise rendered meaningless by the Sixth Circuit. For example, the Sixth Circuit noted that Respondent was notified in writing by the department chairman that "It was recommended that you be appointed an associate professor without tenure ... The question of recommending tenure will be considered by a similar departmental group at the time you become a citizen of the United States" (*Id.*, p. 30). Nevertheless the Court went on to say that Respondent had a viable understanding that his employment would continue on a permanent basis with the Department of Mathematics, *notwithstanding* the statement contained in the October 29 correspondence that [Dr. Soni's] position was one without tenure (*Id.*, p. 33).

The official personnel status change form referred to in the tenure policy of the University (*Id.*, p. 41) and which in Respondent's case expressly classified his position effective July 1, 1969, as "Associate Professor (without tenure)" (See Exhibit E, *supra*) was likewise disregarded by the Court of Appeals.

In addition to destroying the ability of the University to place reliance on its own records, it is certain that morale problems will develop among faculty members who have survived the rigorous examination of their peers and superiors pursuant to the formal tenure policy of the University only to discover that tenure status has been gained by other faculty members who have obtained the same status by some unofficial means.

QUESTION 3

IF RESPONDENT WAS NOT PRECLUDED FROM OBTAINING DE FACTO TENURE FROM THE UNIVERSITY OF TENNESSEE IN A MANNER CONTRARY TO AND INCONSISTENT WITH THE PROVISIONS AND REQUIREMENTS OF THE UNIVERSITY'S FORMAL TENURE SYSTEM, DID RESPONDENT IN FACT OBTAIN SUCH DE FACTO TENURE?

This Court, in *Perry*, held that:

> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or *mutually explicit* understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Perry*, *supra*, p. 602 (emphasis supplied).

However, this Court warned that a "mere subjective expectancy" is not protected by procedural due process. *Perry*, *supra*, p. 603.

The Sixth and Eighth Circuits have reached widely divergent positions regarding the scope of this holding.

The Sixth Circuit ruled that Respondent met the requirements of *Perry* and did not have a "mere subjective expectancy" of future, continued and permanent employment even though: (1) the head of the Mathematics Department pointed out to the faculty attending the October 29, 1968, meeting that Respondent "could not be appointed formally to a permanent position in view of the University regulations and a state law" (App. B, *supra*, p. 29), (2) no vote was taken at that meeting to appoint Respondent to a permanent position. *Ibid.*, (3) a formal letter was sent from the department head to Respondent on the same date informing him that he had been recommended for an ap-

BLEED THROUGH

pointment as "associate professor without tenure" and that the question of recommending him for tenure "will be considered ... at the time you become a citizen of the United States" (*Id.*, p. 30); (4) Respondent was aware of the disqualifying statute and University regulation (*Id.*, p. 31); (5) a specific tenure policy existed which stated the specific manner in which promotions were to be obtained: "recommendations are made by the department head to the dean of the college ... (who) forwards his recommendation to the Academic Vice President, who ... submits his recommendation to the President. After Presidential action, the Board of Trustees acts on the recommendation" (App. A, *supra*, p. 21 fn. 1); (6) the evidence offered by Respondent in support of his claimed property interest was derived from individuals *not* authorized to grant tenure, and not even claimed by Respondent to be so authorized (i.e. the department head and faculty members) (App. B, *supra*, pp. 28-32) (see also Exhibit D, *supra*, p. 44); (7) the evidence derived even from these unauthorized sources was completely speculative and subjective, i.e. Respondent was "congratulated" following the October 29 meeting (App. B, *supra*, p. 30), Respondent was told by the department head that the faculty wanted Respondent to stay at the University, that the meeting had been "favorable" and that Respondent's "prospects with the University were good" (*Ibid.*); (8) the only item of evidence presented by Respondent which was not derived from the utterances of non-officials of the University was the Respondent's inclusion in the TIAA/CREF retirement program of the University, a program mistakenly characterized by the Sixth Circuit as "*ordinarily* available only to permanent personnel" (*Id.*, p. 31). This benefit was granted to Respondent in the same letter by which Respondent was informed of his recommendation for an appointment "*without tenure*" (*Id.*, p. 30). Moreover, the head of the

Mathematics Department testified that a person was not required to have tenure in order to participate in the TIAA/CREF retirement program (App. D, *supra*, pp. 45). There was absolutely no presentation of evidence that non-tenured faculty were *not* permitted to participate in the retirement program.

In *Cusumano*, the Eighth Circuit took a view of the *Perry* holding which sharply conflicted with the Sixth Circuit's.

Aside from the issue of whether or not de facto tenure can be obtained by a faculty member at an institution which possesses a formal tenure policy (the Eighth Circuit holds that it cannot, *supra*, at p. 11), the Eighth Circuit held that it could not find any reasonable expectancy of reemployment since written tenure regulations expressly provided for the termination of probationary employees or those without tenure (*Cusumano*, *supra*, at p. 984). The feeling of the Eighth Circuit clearly was that an individual could not reasonably expect to have a property interest where a formal tenure policy expressly provides the method by which such an interest is to be obtained and the claimed interest has not been obtained by that method.

The significance of the question is readily discernible. By the Sixth Circuit's interpretation of *Perry*, The University of Tennessee is bound not only by the utterances and actions of authorized officials such as Petitioners but also by the actions and utterances of others who have not been authorized to act for the University.

An incredible burden is placed on the University and its officials to monitor and disavow every action and utterance by faculty members, employees, and other individuals who, even though *authorized* by The University of Tennessee to grant tenure, might nevertheless create in some faculty member an expectancy of future and continued employment.

BLEED THROUGH

This Court is therefore respectfully urged to consider this question.

QUESTION 4

DOES THE PROVISION OF THE CHARTER OF THE UNIVERSITY OF TENNESSEE THAT THE UNIVERSITY MAY "SUE AND BE SUED" CONSTITUTE A WAIVER OF THE UNIVERSITY'S ELEVENTH AMENDMENT IMMUNITY, AS A STATE AGENCY, SUCH THAT THE PROPERTY OF THE UNIVERSITY IS SUBJECT TO DIVESTITURE THROUGH EXERCISE OF JUDICIAL POWER?

There is a conflict between the Tennessee Supreme Court and the Sixth Circuit.

The Sixth Circuit noted that the Charter of The University of Tennessee pursuant to legislative enactment of 1807 provided:

> "The said trustees and their successors by the name aforesaid, may sue and be sued, plead and be impleaded, in any court of law or equity in this State or elsewhere." (App. B, *supra*, p. 34). (See: Acts of Tennessee, 1807, Chapter 64, Section 1.)

The Courts of Appeals concluded that such provision constitutes a waiver of any Eleventh Amendment immunity which the University might otherwise have had (App. B, *supra*, p. 37) and therefore that the Eleventh Amendment did not bar a money judgment against the University (*Id.*, p. 38).

Tennessee Code Annotated 20-1702, enacted in 1873, conflicts with the opinion of the Sixth Circuit:

> "No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the

state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers..."

The Tennessee Supreme Court has taken a position in direct conflict with the Sixth Circuit:

"... the state, and the public represented by it, must be considered as the owner of the property held by the University [of Tennessee] and that the sovereign character of the state's ownership is not changed by the creation of a corporation as a convenient means through which the state exercises the strictly governmental function of educating the youth among its citizens. We are not able to find that the state has lost or divested itself of any element of sovereignty in the creation of this corporation which is subject to the will of the legislative branch of the state government in every particular, and the only purpose of which is to perform a governmental function." *University of Tennessee v. People's Bank*, 6 S.W.2d 328 (1928).

This recognition of the state ownership and sovereign nature of property held by The University of Tennessee has been referred to by the State Supreme Court on various occasions. *Knoxville Housing Authority, Inc. v. City of Knoxville*, 123 S.W.2d 1085, 1086 (1939); *Baker v. Nashville Housing Authority*, 408 S.W.2d 651, 657 (1966); *Applewhite v. Memphis State University*, 495 S.W.2d 190, 197 (1973).

The Office of the Attorney General of the State of Tennessee has offered an opinion, also in conflict with the Sixth Circuit's opinion, which rules that The University of Tennessee is immune from suit by virtue of the 1873 statute, T.C.A. 20-1702 (App. F, *supra*).

Because a monetary judgment payable out of the property of The University of Tennessee has never, prior to this case, been entered against the University and because such a possibility threatens a most serious financial impact on the University and the State of Tennessee, this Court is urged to grant certiorari for the purpose of permitting complete briefing and argument on the question of whether or not The University of Tennessee has waived its immunity to the extent of subjecting its property to divestiture through exercise of judicial power.

CONCLUSION

For the reasons stated above, Petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
Northern Division

DR. RAJ P. SONI,
Plaintiff,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE and EDWARD J. BOLING,
Defendants.

Civil Action No. 8378

MEMORANDUM

(Filed February 21, 1974)

Plaintiff, Dr. Raj P. Soni, a former nontenured professor with the Department of Mathematics of the University of Tennessee, brought this action against the University claiming he was not accorded procedural due process under the Fourteenth Amendment when the University refused to renew his contract without sufficient notice of charges against him and without a sufficient hearing. Plaintiff's principal claim is premised on the companion cases of Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Jurisdiction is invoked under 28 U.S.C. §§1331, 1343(3).

In response to an increase in demand for mathematics professors in July 1967, defendant hired plaintiff as a visiting Associate Professor of Mathematics, such employment to commence in September 1967 and remain effective throughout the school year of 1967-1968. Prior to leaving the I.B.M.

BLEED THROUGH

Corporation in September 1967 to join the Math Department, plaintiff's full time teaching experience at the college level included six years as an instructor in India and one year as an associate professor at Oregon State University.

In response to previous personal inquiries regarding the permanency of his job status with the University, and, pursuant to the recommendation of the former head of the Department, Dr. Donald J. Dessart, then Acting Head of the Department of Mathematics, on October 24, 1968 advised the appropriate faculty members that a special meeting would be held on October 29, 1968 to consider approving plaintiff for a permanent appointment.[1]

Professor Shaffer, a tenured member of the Mathematics Department, testified that he attended the October 29 meeting but was advised by Dr. Dessart at that time that a vote on plaintiff's tenure would be inappropriate under the circumstances since plaintiff was then an alien and accordingly could not hold a permanent faculty position with the Univer-

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1. Chapter IV of the University of Tennessee Faculty Handbook (1962), in effect at the time provided under the caption, "Periodic Consideration," in part that:

> "In general, all recommendations for promotion or salary adjustments within a department are initiated by the department head . . . Normally, all such recommendations are made in conjunction with the preparation of the budget."
>
> • • • • •
>
> "Final Decision
>
> "Final decision on promotions or salary adjustments within rank will be made by the Board of Trustees."

More particularly, the administrative scheme is set forth at page 18, which provides that recommendations are made by the department head to the dean of the college. Subsequent to any hearing and advisement, the dean forwards his recommendation to the Academic Vice President, who, upon concurrence submits his recommendation to the President. After Presidential action, the Board of Trustees acts on the recommendation.

sity.[2] Likewise, Professor Bradley, a tenured faculty member of the Department, who also attended the October 29 meeting stated that he was advised by Dr. Dessart that the committee could not formally vote on the question of tenure due to plaintiff's alien status.

Plaintiff testified that after the special meeting he was "congratulated" by those faculty members who had attended the meeting. Following the October 29 meeting, plaintiff received a letter from Dr. Dessart that stated it "was recommended that [he] be appointed an associate professor without tenure. . . . The question of recommending tenure will be considered by a similar departmental group at the time you become a citizen of the United States. In addition, it was recommended that you receive the full benefits of participation in TIAA/CREF at the first reasonable opportunity . . . ."

The TIAA/CREF is a financial retirement program at the University that, according to the Faculty Handbook (p. 25) at that time, was restricted to "permanent type personnel."

As Dr. Dessart's October 29 letter was not in accord with the spirit of the earlier congratulations, plaintiff sought conference with Dr. Dessart, who advised him that the law pre-

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2. 49 Tenn. Code Ann. 1303 provides in part:

"It shall be **unlawful** for the trustees of the University of Tennessee . . . to employ any . . . teacher . . . to have in any way the custody and care of students of the public educational institutions of this state who is not a citizen of the United States of America; provided that nothing in this section shall be construed to prohibit arrangements whereby professors and teachers who are citizens of other nations may be employed on a temporary basis on the faculties of colleges, universities or public schools in Tennessee . . ." This state policy was effected at the faculty level at p. 15 of the faculty handbook: "Citizens of other countries may be employed in temporary positions only."

As the case under examination here is governed by the **Roth** and **Sindermann** guidelines, it is inappropriate at this time to make a dispositive finding on this statute's constitutionality.

BLEED THROUGH

cluded a grant of tenure but that his prospects with the University of Tennessee were good. Indeed, Dr. Dessart testified that had a vote been taken at the October 29 meeting he would have voted for granting plaintiff tenure.

Additionally, plaintiff further testified that thereafter in all other operative respects he was treated by his fellow faculty members as a tenured professor—a person with some permanency in the Department's future. In particular, plaintiff was invited and attended on two occasions the annual meetings of tenured faculty, where he was afforded the opportunity to participate in the discussions and vote on the tenure status of other mathematics professors.

Satisfied with his conversation with Dr. Dessart and the assurances of his fellow faculty members, together with other evidence of his permanency in the University community, plaintiff and his wife purchased a home in the Knoxville area. He continued to teach in the Department of Mathematics for the school years 1969-1970, 1970-1971, and 1971-1972. On December 15, 1971 he became a citizen of the United States. On March 8, 1973 plaintiff was summarily notified by letter that his appointment as an Associate Professor would be terminated as of August 31, 1973. Plaintiff was not afforded a hearing by any departmental or administrative committee, but was only advised in the termination letter that his performance as a teacher was not "of the quality we expect of our tenured staff." Plaintiff sought recourse through the appropriate administrative procedures, but, to date, has not been granted a due process hearing.

Against this factual background, the Court concludes that under *Roth* and *Perry*, there existed sufficient objective evidence to vest in plaintiff a cognizable property interest in the form of a reasonable expectation of future and continued employment. Defendant objectively acted toward plaintiff in such a manner as to reasonably lead him to believe that

he was a person with a relative degree of permanency in the academic community of this University. Upon acquiring this property interest, it cannot be terminated without procedural due process.

The Court is mindful and appreciative of the guidelines set forth in *Roth* and *Perry* and the posture in which the Court made its rulings. Thus, it is generally accepted that a mere subjective expectancy of continued re-employment by a non-tenured teacher is not an interest protected. Rather, there is necessarily precedent to such a property interest a finding by the court that there exist sufficiently objective indicia to lead a non-tenured teacher to reasonably believe a degree of stability had attached itself to his position. Under *Perry*, it is the responsibility of the Court to analyze the totality of circumstances surrounding the teacher's employment to determine whether the formal conduct of those around him provide a sufficient basis of objective expectancy of future employment. In seeking to define this property interest, the Supreme Court emphasized in *Perry* that traditional notions of property do not require rigid and formalistic tests. Rather, it recognized that the absence of tenure did not preclude a finding that the teacher has a "property" interest in re-employment if the acts and conduct of all the parties concerned lead to a mutually explicit understanding. 408 U.S. at 601.

> "A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a 'common law of a particular industry or of a particular plant' that may supplement a collective-bargaining agreement (citation), so there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure."

BLEED THROUGH

408 U.S. at 602, 92 S. Ct. at 2700, 33 L. Ed. 2d at 580.

If this Court is to eschew formalistic and technical tests in finding property interest then the mere presence of a formal tenure system, as is the case under examination here, should not be a dispositive distinction between *Perry* and the case before this Court. It is the opinion of the Court that under the circumstances here, plaintiff had a viable understanding that his employment would continue on a permanent basis with the Department of Mathematics, notwithstanding the statement contained in the October 29 correspondence that plaintiff's position was one without tenure. All the evidence and testimony received by the Court points toward a mutual understanding of job permanency.

While the issues of the constitutionality of the Tennessee statute restricting tenure to United States citizens is not before the Court, plaintiff could have reasonably concluded that "but for" the statute's presence he would have been granted tenure in 1968. Additionally, plaintiff was treated as a tenured faculty member and such objective manifestations served as a reasonable basis for a mutual understanding between plaintiff and the University.

Remaining, therefore, is the appropriate relief for plaintiff. In *Perry* the Court submitted that "[p]roof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603. However, due process, an inherently illusive concept, requires the adoption of different procedures at different times. Plaintiff here should be afforded a statement of the charges against

him, the names of witnesses who will appear on behalf of the University and the nature of their expected testimony, an opportunity for plaintiff to appear with an attorney, at a hearing before an appropriate tribunal that possesses some academic expertise, and answer and confront charges against him. It should be emphasized, however, that a fair and adequate hearing need not be conducted in a trial-like atmosphere.

As plaintiff's termination under the March 8 letter was without minimal due process and, therefore, wrongful, plaintiff is entitled to back pay from August 31, 1973 until the University completes a hearing complying with the above requirements. Davis v. Barr, 373 F. Supp. 740 (E.D. Tenn. 1973); Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973).

As noted in *Perry*, the relationship between "a state institution and one of its teachers is essentially a matter of state concern and state law."[3] This Court does not sit in review of University procedures and in this opinion does not reflect either on the merits of plaintiff's capabilities and methodology as a teacher or the basis of the Department's non-retention of plaintiff. See generally, Lukac v. Acocks, 466 F.2d 577 (6th Cir. 1972); Hetrick v. Martin, 480 F.2d 705 (6th Cir. 1973); Harp v. Clemens, 464 F.2d 1029 (6th Cir. 1972); Poddar v. Youngstown State Univ., 480 F.2d 192 (6th Cir. 1973).

In conclusion, the parties will proceed in compliance with this memorandum and it is ordered that plaintiff receive all back pay from August 31, 1973 until the completion of an appropriate hearing.

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3. 408 U.S. at 593 (C. J. Burger, concurring).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DR. RAJ P. SONI,
Plaintiff-Appellee,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ET AL.,
Defendants-Appellants.

NO. 74-1602

March 12, 1975

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

PHILLIPS Chief Judge.

Dr. Raj P. Soni, a mathematics professor at the University of Tennessee, filed a complaint in the District Court alleging that he was denied procedural due process when the University failed to renew his teaching contract without giving him adequate notice or a hearing. District Judge Robert L. Taylor, sitting without a jury, held that Dr. Soni was entitled to a due process hearing and to back pay from the date of contract termination until the University provided such a hearing. Judge Taylor's opinion is reported at 376 F.Supp. 289 (E.D. Tenn. 1974). The University appeals. We affirm.

Jurisdiction is invoked under 28 U.S.C. §§ 1331 and 1343(3).

Dr. Soni was born and reared in India. He attended an Indian university from which he received a Bachelor of Arts degree and a Master of Arts degree in mathematics. For several years Dr. Soni taught mathematics at the college level in India, and in 1959 he came to the United States to obtain his Ph.D. degree in mathematics from Oregon State University, which he received in 1963.

In September 1967, Dr. Soni joined the Mathematics Department of the University of Tennessee as a Visiting Associate Professor. At this time, Dr. Soni's teaching experience at the college level included six years as an instructor in India and one year as an Associate Professor at Oregon State University.

On several occasions during the 1967-1968 school year, Dr. Soni discussed with the then head of the Department of Mathematics, Professor John H. Barrett, the question of his being granted a permanent position at the University. At that time Dr. Soni was concerned about the permanency of his job status with the University and was interested in having a decision made one way or the other. As a result of these discussions, it was agreed between Dr. Soni and Professor Barrett that his visiting appointment would be extended for the 1968-1969 school year, and that a decision about a permanent appointment would be made in the fall of 1968.

On October 3, 1968, Professor Barrett issued "A recommendation for consideration by Professors and Associate Professors (with tenure)" regarding Dr. Soni and his wife, Mrs. Kusum Soni:

I recommend that Professor Raj Soni be offered an Associate Professorship with tenure.

. . . . .

Shortly after he arrived, he and I agreed that a two-year visiting position would be appropriate and that during this time we would consider him for a permanent position.

. . . . .

Since it is not possible for two people in the same family to have tenure in the same department, there is no question of tenure for Mrs. Soni. However, I recommend that we express our intention to keep her on the staff permanently.

Later that month Dr. Donald J. Dessart, who was appointed Acting Head of the Department of Mathematics when Professor Barrett became ill, called a special meeting of the Department's tenured faculty solely to consider approving Dr. Soni for a permanent appointment. At the meeting on October 29, 1968, Professor Dessart summarized the contents of Professor Barrett's memorandum recommending tenure for Dr. Soni. During the ensuing discussion, Professor Dessart pointed out that Dr. Soni was not a citizen of the United States and, consequently, could not be appointed formally to a permanent position in view of a University regulation and a state law, T.C.A. § 49-1303, quoted in footnote 1, providing that although aliens could be appointed to temporary positions at the University, they could not receive permanent appointments.

Because of the state law, the University regulation, and Dr. Soni's foreign citizenship, no formal vote was taken at the meeting on appointing Dr. Soni to a permanent faculty position with the University. Instead, Dr. Soni was changed

from a Visiting Associate Professor to an Associate Professor for the 1969-1970 school year. Immediately following the special meeting, Dr. Soni was congratulated by those faculty members who had attended and was assured by his colleagues that the action taken at the meeting had been favorable.

Shortly thereafter, Dr. Soni received a letter dated October 29 from Professor Dessart stating in part as follows:

> [I]t was recommended that you be appointed an associate professor without tenure . . . . The question of recommending tenure will be considered by a similar departmental group at the time you become a citizen of the United States. In addition, it was recommended that you receive the full benefits of participation in TIAA/CREF at the first feasible opportunity . . . .

The TIAA/CREF is a financial retirement program at the University that was restricted at that time to "permanent type personnel."

In contrast to the congratulations of his colleagues, the October 29 letter seemed unfavorable and indefinite to Dr. Soni, and accordingly he sought out Professor Dessart for an explanation. Professor Dessart informed Dr. Soni that state law prohibited a grant of tenure to aliens, but he also gave assurances that the meeting in fact had been favorable, that the faculty wanted Dr. Soni to stay at the University, and that Dr. Soni's prospects with the University were good. According to Dr. Soni, he also was told that he would be treated like any other tenured professor.

BLEED THROUGH

Satisfied that his nontenured status was a matter of form necessitated by a technical state law, Dr. Soni purchased a home in the Knoxville area and stopped looking for employment elsewhere. He continued teaching at the University through the 1971-1972 school year, and on December 15, 1971, he became a naturalized United States citizen. During this time Dr. Soni was given no reason to believe that he was not a permanent member of the faculty. As stated above, Dr. Soni was permitted to participate in the University retirement program, which was ordinarily available only to permanent personnel. He attended departmental meetings and voted on tenure for other teachers, and he received further verbal assurances from his colleagues.

On March 8, 1972, however, Dr. Soni was notified that his appointment would be terminated as of August 31, 1973, because his performance as a teacher and as a research mathematician had "not been of the quality we expect of our tenured staff."

He was never granted a due process hearing as provided by the University's tenure policy. This policy statement is made Appendix A to this opinion.

1) Reasonable Expectation of Continued Employment

Judge Taylor found as a fact that despite Dr. Soni's awareness of the disqualifying statute,[1] "there existed sufficient objective evidence to vest in plaintiff a cogni-

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1. This statute, T.C.A. § 49-1303, provides in part as follows:

49-1303. Aliens as teachers — Advocating overthrow of government.— It shall be unlawful for the trustees of the University of Tennessee, the state board of education, or any local board of education, or any other person to employ any superintendent, principal, teacher, tutor, supervisor, or other person to have in any way the custody and care of students of the public educational institutions of this state who is not a citizen of

(Continued on following page)

zable property interest in the form of a reasonable expectation of future and continued employment," 376 F.Supp. at 292, within the meaning of Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

The District Court further held that the University "objectively acted toward plaintiff in such a manner as to reasonably lead him to believe that he was a person with a relative degree of permanency in the academic community of this University. Upon acquiring this property interest, it cannot be terminated without procedural due process." 376 F.Supp. at 292.

On the record before us, these findings cannot be held clearly erroneous, but to the contrary are supported by substantial evidence. Based on his findings, Judge Taylor correctly concluded that Dr. Soni's employment could not be terminated without notice and a hearing before an appropriate tribunal.

Appellants contend, however, that Dr. Soni could not have acquired a reasonable expectation of continued employment because the University of Tennessee had a well-

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(Continued from preceding page)

the United States of America; provided that nothing in this section shall be construed to prohibit arrangements whereby professors and teachers who are citizens of other nations may be employed on a temporary basis on the faculties of colleges, universities or public schools in Tennessee.

The District Court did not pass on the constitutionality of this statute, and the issue is not before us now. We simply note that the validity of § 49-1303 is open to question. See Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973); In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973).

BLEED THROUGH

established tenure system that would have prevented any expectancy from arising in a professor who had not been granted formal tenured status. We do not find this argument convincing. The Supreme Court has stated that a legitimate expectancy of continued employment "is particularly likely in a college or university . . . that has no explicit tenure system even for senior members of its faculty, but that nonetheless may have created such a system in practice." Perry v. Sindermann, 408 U.S. 593, 602, 92 S.Ct. 2694, 2700 (1972). The Court did not say, as it easily could have, that a reasonable expectancy can not arise in the context of a formal tenure system. The existence of such a system is but one factor for the trial court to consider in analyzing the due process claim of a formally nontenured professor.

In this case, we believe that Judge Taylor properly considered all of the circumstances of the employment relationship and correctly concluded that Dr. Soni "had a viable understanding that his employment would continue on a permanent basis with the Department of Mathematics, notwithstanding the statement contained in the October 29 correspondence that [Dr. Soni's] position was one without tenure." 376 F.Supp. at 292.

2) Award of Back Pay

Judge Taylor held that Dr. Soni is entitled to back pay from August 31, 1973 until the University completes a due process hearing meeting the requirements set forth in his opinion. 376 F.Supp. at 293. The University contends that this award violates the eleventh amendment and must be reversed under Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

Appendix B

The eleventh amendment, which has remained unchanged since its ratification was announced formally to the Congress in 1798, provides as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Thus we are faced with the threshold question of whether this action against the University of Tennessee is a suit against the State within the meaning of the amendment. It is well established that even though a state is not named a party to an action, the eleventh amendment still may bar the action if it seeks "to impose a liability which must be paid from public funds in the state treasury . . . ." Edelman v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347 (1974).

The educational institution now known as the University of Tennessee was incorporated by the General Assembly of Tennessee by Chapter 64 of the Acts of 1807 (Scott's Revision, Vol. 1, 1047 (1820)).[2] The original charter provides that "The said trustees and their successors by the name aforesaid, may sue and be sued, plead and be impleaded, in any court of law or equity in this State or elsewhere."

The University is managed and controlled by the Board of Trustees, whose members include the Governor, the Commissioners of Agriculture and of Education, the President of the University, the Executive Director of the Higher Education Commission, and seventeen other members appointed by the Governor and subject to confirmation by the Tennessee Senate. T.C.A. §§ 49-3301 to -3303. The

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2. This charter was amended as recently as 1971. Ch. 352, Public Acts of 1971.

Board is empowered to borrow money and to issue bonds, which do not thereby become obligations of the State of Tennessee. T.C.A. §§ 49-3501 to -3510. The University receives income from many sources in addition to the substantial annual appropriations from the Tennessee Legislature.

In University of Tennessee v. Peoples Bank, 157 Tenn. 87, 6S.W.2d 328 (1928), the Supreme Court of Tennessee held that a claim of the University was entitled to preference in a receivership proceeding for the liquidation of an insolvent bank. The Supreme Court said:

> We are of the opinion that the state, and the public represented by it, must be considered as the owner of property held by the University, and that the sovereign character of the state's ownership is not changed by the creation of the corporation as a convenient means through which the state exercises the strictly governmental function of educating the youth among its citizens. We are not able to find that the state has lost or divested itself of any element of sovereignty in the creation of this corporation which is subject to the will of the legislative branch of the state government in every particular, and the only purpose of which is to perform a governmental function. Id. at 95, 6 S.W.2d at 330.

We have been unable to find any case discussing the University's status under the eleventh amendment. There are, however, many federal cases from other circuits holding other state colleges and universities to be state instrumentalities that enjoy the protection of the eleventh amendment. *See*, *e.g.*, Brennan v. University of Kansas, 451 F.2d 1287, 1290 (10th Cir. 1971); Williams v. Eaton, 443 F.2d 422, 427-28 (10th Cir. 1971) (University of Wyoming); Walstad v. University of Minnesota Hosps.,

442 F.2d 634, 641-42 (8th Cir. 1971); Board of Trustees of Arkansas A & M College v. Davis, 396 F.2d 730 (8th Cir.), cert. denied, 393 U.S. 962, 89 S.Ct. 401, 21 L.Ed. 2d 375 (1968); Hamilton Mfg. Co. v. Trustees of State Colleges in Colorado, 356 F.2d 599 (10th Cir. 1966); Scott v. Board of Supervisors of Louisiana State University, 336 F.2d 557 (5th Cir. 1964); Board of Regents of the University of Nebraska v. Dawes, 370 F.Supp. 1190 (D. Neb. 1974). In addition, two district courts in this circuit have reached essentially the same conclusion. Depperman v. University of Kentucky, 371 F.Supp. 73, 77 (E.D. Ky. 1974); Huckins v. Board of Regents of University of Michigan, 263 F.Supp. 622 (E.D. Mich. 1967).

This line of authority, of course, does not control the present case. Each state university exists in a unique governmental context, and each must be considered on the basis of its own peculiar circumstances. For example, in the *Walstad* and *Scott* cases, *supra*, the state constitutions apparently contained provisions specifically extending state immunities to the universities. No such provision appears in the Tennessee Constitution. In addition, a federal district court recently scrutinized three state-related universities and concluded that they were not state instrumentalities. Samuel v. University of Pittsburgh, 375 F.Supp. 1119 (W.D. Pa. 1974), appeal dismissed for want of an appealable order, 506 F.2d 355 (3d Cir. 1974) (University of Pittsburgh, Temple University, Pennsylvania State University).

We are uncertain whether the University of Tennessee is a state instrumentality protected by the eleventh amendment. The record before us contains little data on the University's financial relationship with the State of Tennessee, and the Tennessee cases and statutory materials do not compel a conclusion one way or the other.

BLEED THROUGH

Assuming, without deciding, that this action is a suit against the State within the meaning of the eleventh amendment, we believe that Tennessee has waived the immunity by consenting to suits against the University of Tennessee. As noted above, the University's original charter provides that it may "sue and be sued, plead and be impleaded, in any court of law or equity in this State or elsewhere." We are not unmindful that a waiver of a constitutional right must appear clearly and may not be lightly inferred. Edelman v. Jordan, 415 U.S. 651, 673, 94 S.Ct. 1347 (1974). For example, it seems generally agreed that a state's consent to be sued in its own courts does not necessarily imply consent to be sued in federal court. *See* Williams v. Eaton, 443 F.2d 422, 428 (10th Cir. 1971); Scott v. Board of Supervisors of Louisiana State University, 336 F.2d 557, 558 (5th Cir. 1964). We are also aware that when a "public instrumentality is created with the right 'to sue and be sued' that waiver of immunity in the particular setting may be restricted to suits or proceedings of a special character in the state, not the federal courts." Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 277, 79 S.Ct. 785, 787, 3 L.Ed.2d 804 (1959); *see* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 465-66 & n.8, 65 S.Ct. 347, 89 L.Ed. 389 (1945); Board of Regents of the University of Nebraska v. Dawes, 370 F.Supp. 1190, 1193 (D. Neb. 1974).

In this case, however, the University of Tennessee was created, only a few years after the ratification of the eleventh amendment, with the unrestricted right to sue and to be sued "in any court of law or equity." We see no indication that this sweeping consent was intended to be limited to suits brought in the state courts. To the contrary, by its terms the consent is general and purports to apply to any court and to any type of suit.

Article 1, § 17 of the Constitution of Tennessee provides that "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." This language originated with the State's first Constitution of 1796 and was carried forward into the Constitutions of 1834 and 1870. The Legislature of Tennessee has consented that the University may sue and be sued. The power to sue grants to the University the right to recover a money judgment. Consent to be sued inescapably subjects the University to the hazard of having a money judgment rendered against it.

We, therefore, conclude that the eleventh amendment does not bar the money judgment against the University in this case.

Accordingly, the judgment of the District Court is affirmed. The costs of this appeal are taxed against the University of Tennessee.

APPENDIX A

Tenure Policy

After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure,[1] and their services should be terminated only for

1. Granting of tenure is an expression of confidence in the integrity and worth of an individual teacher, scholar, or teacher-scholar. Tenure is a code word which may be expanded into a statement. It says something of this sort: "You have performed well and responsibly here (or elsewhere; or here and elsewhere) over a period of time. We have need for your services now and will continue to need them for many years to come. We believe that you will continue henceforward to perform well and responsibly. So that you may be free from concern over retaining your position, we guarantee that so long as you want to stay and so long as you continue to perform well and responsibly, you will have your place and will be eligible for pro-

(Continued on following page)

adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of bona fide financial necessities of the University. The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

Beginning with appointment to the rank of full-time Instructor of a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to this institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period. During the probationary period a teacher should have the freedom and responsibility that all other members of the faculty have.

Except in cases of gross incompetency, immorality or felony, where the facts are not in dispute, termination for

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motions, increases in stipend, and any other rewards available to the tenure staff. We further guarantee that you are protected from the capricious exercise of administrative powers. Tenure can only guarantee the rank and salary (not always the salary if, for any reason, the University should suffer severe financial reverses) agreed upon at the time tenure is granted. And, of course under conditions described on pp. 20-22 of The Faculty Handbook, tenure insures use of proper procedures before a dismissal, but it does not insure against dismissal after proper procedures have been followed."

cause of a continuous appointment or the dismissal for cause of a teacher previous to the expiration of a term appointment whether based on charges initiated by the Trustees, administration, or members of the faculty should be considered by a committee composed of representatives of both the faculty and the administration, with the right to all parties to have a re-examination of the case by the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should, prior to the hearing, be informed in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence, the testimony should include that of teachers and other scholars.

The administration may for grave cause suspend an accused faculty member pending immediate investigation and speedy hearing, or, on recommendation of the faculty and administration committee, the administration may suspend a faculty member for cause. In any case of suspension the accused faculty member should suffer no loss of salary unless he is adjudged guilty and his appointment is terminated, in which event the committee, subject to the approval of this Board, will determine the date of termination.

Administrative Procedures Relative to Tenure

1. All initial appointments shall be without *tenure* unless the letter of appointment states otherwise. Ordinarily, tenure will be considered after completion of a probationary period of not more than three years for a person in the rank

BLEED THROUGH

of Assistant Professor, and may be considered after one year for persons in the ranks of Associate Professor or Professor. (A full-time Instructor may be placed on tenure upon the recommendation of the department head and dean of the college and when approved in writing by the Academic Vice Chancellor. Instructors usually serve a probationary period without tenure not to exceed seven years.)

2. Proposals to bestow tenure, either at the time of a first appointment or subsequently, shall be the responsibility of those who initiate recommendations for academic promotions.

3. If tenure has not been specified in the appointment letter, the change from a non-tenure to a tenure status shall be accomplished through the processing of a Personnel Change of Status Form followed by appropriate notification from the dean of the college to the person involved.

From the Minutes of the Annual Meeting of the Board of Trustees of the University of Tennessee, Nov. 4, 1955, as revised in 1966 and in 1970.

Appendix B

No. 74-1602

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUN 5 1975
John P. Hehman,
Clerk

DR. RAJ P. SONI,
Plaintiff-Appellee,

v.

BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE, ET AL.,
Defendants-Appellants.

ORDER

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

It is ORDERED that the opinion of the court in this case, announced March 12, 1975, be amended by inserting at the end of the first paragraph the following paragraph:

"Jurisdiction is invoked under 28 U.S.C. §§1331 and 1343(3)."

Entered by order of the court.

/s/ John P. Hehman
CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUN 5 1975
John P. Hehman,
Clerk

DR. RAJ P. SONI,
Plaintiff-Appellee,

v.

BOARD OF TRUSTEES OF THE
UNIVERSITY OF TENNESSEE, ET AL.,
Defendants-Appellants.

Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ John P. Hehman
CLERK

APPENDIX D

EXCERPT FROM TRANSCRIPT OF DISTRICT COURT PROCEEDINGS

* * *

[99] MR. LEADBETTER: That is all for Dr. Matthews. Now on Dean Nielsen, we believe that he would testify, first of all that the faculty members are not authorized to grant anyone tenure, nor is the department head.

THE COURT: That has been proven here this morning without any doubt.

MR. LEADBETTER: Okay.

THE COURT: The faculty only recommends.

MR. LEADBETTER: These are only recommendations. That there is only one way to grant, to receive ten-

[100] ure, and that is by an approval of the higher administrative authorities of the University, and all these approvals of tenure are contained in the records, the Personnel Status Change Forms of the University. If it isn't there, they don't have tenure.

THE COURT: That's right.

* * *

TESTIMONY OF DR. DONALD J. DESSART

[DIRECT EXAMINATION]

[BY MR. LEADBETTER:]

[84] Q Then is it correct to say that a person was not required to be tenured in order to participate in meetings of the overwhelmingly tenured faculty?

A That is right.

Q Also with regard to participation in TIAA/CREF, this is back in 1968, is it your understanding that a mem-

ber of the faculty was not required to have tenure in order to participate in the retirement system?

A One does not have to have tenure in order to participate in the retirement system.

* * *

APPENDIX E

The University of Tennessee

☐ Administrative (Non-Faculty)
☒ Academic - Faculty Status
☐ Academic - Professional (Non-Fa
☐ Clerical and Supporting

College or Division Liberal Arts Department Mathematics Date April 21, 196

Name Soni Raj P. Title Visit. Assoc.Professor (without tenure) Title No. 2030
(Last) (First) (Middle Initial)

Base Account No. for 121052 2367
(Department) (Sub-Account) (Position No.)

Complete Items 5 & 6 when executing Items 1, 2, 3, or 4.

☐ 1. TERMINATION effective _____ Reason _____
Future address and position _____

☐ 2. LEAVE OF ABSENCE effective _____ ending _____
Future address _____
Justification _____

☐ 3. TRANSFER TO NEW DEPARTMENT: _____ effective _____
(Name of New Department) (Date)
With title of _____ (Title in Full) (Title No.)
Official work location _____ (Complete Address to which official mail should be directed)

☒ 4. PROMOTION/or CHANGE IN TITLE TO Assoc. Prof. (without tenure) 2030
(New Title - in Full) (Title Number)
Effective July 1, 1969 (Mo. Day Yr.) Justification _____

☐ 5. SALARY CHANGE FROM $ _____ per month, or $ _____ per year
TO $ _____ per month, or $ _____ per year, effective _____ (Mo. Day Yr.)
Justification _____
If part-time, indicate per cent of full-time _____ %

☐ 6. SALARY AND BUDGET CHANGE SUMMARY: Pay charged or chargeable as follows:

Department No.	Sub-Account	Position Number	NAME OF ACCOUNT	Old Monthly Rates	New Monthly Rates	Additional Obligated or (released) Thru June 30, 1969
				$	$	$
			U.T. TOTALS	$	$	$

Non-University Cooperating Agency

$	$	REVISED GROSS ANNUAL RATE
$	$	$

OVER-ALL GROSS

A. Funds available in above budgets, except as follows _____

☐ 7. NAME CHANGE To _____ Revised W-4 Form attached ☐
(First) (Middle Initial) (Last)
A. Husband's Name _____ If divided charges, complete Item 8.
(First) (Middle)

☐ 8. MARITAL STATUS CHANGED To: Married ☐; Single ☐; Widowed ☐; Divorced ☐.

☐ 9. MEALS AND LODGING: A. Quarters ☐ Furnished: ☐ Terminated: Effective _____ (Date)
B. Average number of meals per month changed from _____ to _____ Effective _____ (Date)

☐ 10. OTHER CHANGES _____

Signed _____ Action _____
(Head of Department) (Dean or Director)

Approved _____
(Dean or Director)

Approved _____ Vice President Copy _____

LAWRENCE SILVERMAN
(Signature of Vice Chancellor or Assistant Vice Chancellor or Assistant Vice President)

Vice Chancellor 4/25/69
(Received and Recorded in Original) (Date)

H. B. WHITEHEAD

Vice President Copy

Director of Fi...

BLEED THROUGH

APPENDIX F

State of Tennessee

OFFICE OF THE ATTORNEY GENERAL
Supreme Court Building
Nashville, Tennessee 37219

December 11, 1972

Mr. Donald L. Morton
Executive Director
Fiscal Review Committee
G-3 War Memorial Building
Nashville, Tennessee 37219

Dear Mr. Morton:

This is in response to your letter of November 6th addressed to Attorney General Pack. Our delay in answering is attributable to the fact that a conference was arranged with officials of the University of Tennessee in accordance with your suggestion.

Your initial questions relate to whether the University of Tennessee, as an agency of the State government, is immune from suit under the doctrine of sovereign immunity and whether the University is subject to the Act establishing the Board of Claims, this being Section 9-801 et seq., T.C.A. Claims arising from the University are now being considered and disposed of by the University through its insurance program.

POOR COPY

Appendix F

As stated in the charter and by-laws published by the University of Tennessee Board of Trustees, Chapter 64 of the Acts of Tennessee for the year 1807 provided that the University may sue and be sued in any court of law or equity in this state or elsewhere, thus waiving sovereign immunity as the same applied to the University. However, Chapter 13 of the Acts of 1873 restored sovereign immunity to all agencies of the State Government after such immunity had been generally waived by Chapter 113 of the Acts of 1856. The pertinent language of the 1873 statute

Mr. Morton -2- December 11, 1972

reads as follows:

> "No court in the State of Tennessee, has, or shall hereafter have, any power, jurisdiction, or authority to entertain any suit against the State or against any officer of the State acting by authority of the State, with a view to reach the State, its treasury, funds or property . . ."

It is therefore our opinion that the University of Tennessee, as well as all other agencies of State government, are immune from suit under the provisions of Tennessee law.

The Board of Claims was established by Chapter 73 of the Acts of 1945 as amended and said Act authorized the Board to

> "pay and compensate employees of any department, division, bureau or agency of the state government, who shall receive injury in line of duty . . ."

and

> "to hear and determine all claims against the state for personal injuries or property damage caused by negligence in the construction and/or maintenance of state highways or other state buildings and properties and/or by negligence of state officials or employees of all departments or divisions in the operation of state-owned motor vehicles or other state-owned equipment while in the line of duty . . ."

It would appear to us that the language of this statute is sufficient to embrace all facets of State government, including higher educational institutions. There can be no question but that the University of Tennessee is directly responsible to the General Assembly and that all property held by it is the property of the State. This position has been sustained by decisions subsequent

to *University of Tennessee v. Peoples Bank*, 157 Tenn. 87 (1928), but the holding of the Tennessee Supreme Court is most clearly stated therein:

> "We are of the opinion that the state, and the people represented by it, must be considered as the owner of property held by the university, and that the sovereign character of the state's ownership is not changed by the creation of the corporation as a convenient means through which the state exercises the strictly governmental function of educating the youth among its citizens. We are not able to find that the state has lost or divested itself of any element of sovereignty in the creation of this corporation, which is subject to the will of the legislative branch of the state government in every particular and

> the only purpose of which is to perform a governmental function."

It is therefore our opinion that the University is subject to the provisions of Section 9-801 et seq.

Your inquiry relates in part to the interpretation of Section 9 of Chapter 867 of the Public Acts of 1972, the same being the General Appropriations Bill. The subject section reads as follows:

> "The provisions of this section shall apply equally to higher educational institutions, which shall likewise be subject to the provisions of law in the same manner as other agencies of the state as they relate to being subject to the requirements, restrictions and controls of the State Board of Claims and the State Building Commission."

As stated above, it appears that the University of Tennessee has not been legislatively excluded from the provisions of the Board of Claims Act and that Section 9 would, if anything, merely reaffirm the existing provisions of law for the fiscal year 1972-73. It is, of course, possible that the University would be upheld in its contention that its unique structure exempts it from the Board of Claims Act, and for this reason the contingent effect of Section 9 should be considered.

It is our opinion that, standing alone, Section 9 of Chapter 867 of the Public Acts of 1972 is sufficient to subject the University to the provisions of the Board of Claims Act for the period that the current General Appropriations Bill is in effect. The language of Section 9 specifically relates to higher educational institutions and no exception is made

in the case of the University. It has been suggested that the University would not be so subject because Section 9 is made applicable only to agencies of the State "as they [now] relate to being subject . . . to the State Board of Claims," and that the University is not now so subject. It is our opinion that the language of the Act should be otherwise construed and that it is meant to say that all higher educational institutions shall be subject to the Board of Claims just as other agencies of the State are now so subject. The question has also been raised as to whether the caption of the appropriations bill is sufficiently broad to embrace the provisions of Section 9. It appears to us that the caption is sufficiently broad because the intent stated therein "to make appropriations for the purpose of defraying the expenses of the state government for the fiscal year beginning July 1, 1972" is conditioned as follows: "and to establish certain provisions, limitations and restrictions under which appropriations may be obligated and expended." Section 9 constitutes such a limitation and restriction.

It is our opinion that Section 9-801 et seq., T.C.A. is sufficient to embrace the University of Tennessee and all other agencies of state government and to place all claims arising from its activities under the jurisdiction of the State Board of Claims. It is also our opinion that Section 9 of Chapter 867 of the Public Acts of 1972 expressly reaffirms the jurisdiction of the Board over claims arising from the University for the fiscal year 1972-73.

We realize that compliance with the Board of Claims Act will require substantial changes in the administrative practices of the University, but the legality and constitutionality of legislative acts cannot be predicated upon the practical results that

may ensue from their enactment. Such objections are properly raised and determined only in the General Assembly. It appears to us that the University is clearly subject to the jurisdiction of the Board of Claims, and that a position to the contrary is not supported by any persuasive authority.

Yours very truly,

/s/ W. L. Barry
William L. Barry
Assistant Attorney General

WLB/rc

cc - Mr. John Baugh
Executive Secretary
University of Tennessee Board of Trustees

Mr. James Drinnon
Legal Counsel
University of Tennessee